

**Franco v Garcia**

2022 NY Slip Op 34026(U)

November 16, 2022

Supreme Court, New York County

Docket Number: Index No. 157066/2019

Judge: James G. Clynnes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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ALFREDO FRANCO

Plaintiff,

- v -

LEXIDO R GARCIA,

Defendant.

-----X

INDEX NO. 157066/2019

MOTION DATE 12/13/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS

Upon the foregoing documents and following oral argument, the motion by defendant, Lexido R Garcia (Defendant) for summary judgment on the grounds that Plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d) is denied.

Plaintiff commenced this action alleging he sustained serious injuries within the meaning of Insurance Law 5102 (d) as a result of an August 29, 2018 collision between Plaintiff's bicycle and a motor vehicle operated by Defendant. Plaintiff's Bill of Particulars alleges the following injuries: internal derangement of the left shoulder, with low to intermediate grade interstitial tear of the posterior fibers of the supraspinatus tendon, low-grade interstitial tear of the anterior fibers of the infraspinatus tendon, with lateral downslope of the acromion with subacromial/subdeltoid bursitis; with severe left shoulder pain. Plaintiff alleges that he suffered these injuries requiring arthroscopic surgery on his left shoulder.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York University Medical Center, 64 NY2d 851, 853

[1985]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Licari v Elliott*, 57 NY2d 230 [1982]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad* at 853 [1985]). A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*Toure v Avis Rent a Car Systems Inc*, 98 NY2d 345, 352 [2002]).

Defendant has made a prima facie showing of entitlement to summary judgment. The affirmed reports of Dr. Arnold T Berman, orthopedic surgeon, and Dr. Jessica F Berkowitz, who reviewed Plaintiff's MRIs, demonstrate that as a matter of law, Plaintiff did not sustain a serious injury from the subject accident.

Dr. Berman examined Plaintiff on June 17, 2021 and reported that Plaintiff's "alleged injury to the thoracic spine, resolved; alleged injury to the chest/ribs, resolved; alleged injury to the left shoulder, resolved; alleged arthroscopic surgery to the left shoulder, healed." Dr. Berman also reported that Plaintiff had full range of motion of the thoracic spine and left shoulder, which were measured with a goniometer. Although Dr. Berman noted that Plaintiff reported slight pain on range of motion of the left shoulder, the examination demonstrated an incision and forward elevation to 180 degrees (normal = 180), backward elevation to 40 degrees (normal = 40), abduction to 180 degrees (normal = 180), adduction to 30 degrees (normal = 30), internal rotation to 80 degrees (normal = 80), external rotation to 90 degrees (normal = 90). In preparation of his examination, Dr. Berman reviewed only Plaintiff's Bill of Particulars, noting that no legally authenticated medical records were available for review.

Dr. Jessica F. Berkowitz, a radiologist, undertook an independent review of the MRI of Plaintiff's left shoulder taken on September 17, 2018. Dr. Berkowitz acknowledged Plaintiff had some tearing, multiple small cysts, and rotator cuff abnormalities, all of which she described as chronic and degenerative in origin. Dr. Berkowitz concluded that there was no causal relationship between the claimant's alleged accident and the findings on the MRI examination.

Plaintiff's examination before trial (EBT) testimony that he returned to work full time approximately two months after the accident makes a prima facie showing that Plaintiff was not prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*see DaCosta v Gibbs*, 139 AD3d 487, 488 [1st Dept 2016] where Plaintiff's testimony indicating that she missed less than 90 days of work in the 180 days immediately following the accident and otherwise worked "light duty" was fatal to her 90/180-day claim). The burden therefore shifted to Plaintiff to raise an issue of fact as to whether he sustained a serious injury as a result of the accident and whether he was prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*Licari v Elliott*, 57 NY2d 230 [1982]).

In opposition, Plaintiff relies on the medical records and affirmed report of his treatment with Dr. Albert Villafuerte at Physical Medicine & Rehabilitation of NY, P.C., the Medical Records Report from New York Presbyterian Hospital, reports from Lenox Hill Radiology, and the affirmed medical report of Dr. Louis C Rose, orthopedic surgeon.

Dr. Villafuerte treated Plaintiff beginning in September of 2018 and throughout 2019, 2020, and 2021. Because Plaintiff did not respond to "conservative measures," Dr. Villafuerte referred Plaintiff for an orthopedic evaluation and concluded that surgery on Plaintiff's left shoulder was medically necessary. At each follow up visit, Dr. Villafuerte assessed Plaintiff's left

shoulder range of motion with a hand-held goniometer. Plaintiff's left shoulder range of motion on September 11, 2018, showed flexion with pain at 100 degrees (normal 180 degrees) and abduction with pain at 90 degrees (normal 170 degrees) and internal rotation and external rotations were limited. On Plaintiff's final visit with Dr. Villafuerte, on October 15, 2021, his left shoulder examination revealed tenderness noted on the superior and posterior aspects, which was less than before, flexion was 125 degrees (normal 180 degrees), abduction to 115 degrees (normal 170 degrees), internal rotation was 45 degrees (normal 70 degrees), and external rotation 75 degrees (normal 90 degrees) (NYSCEF DOC NO 30). Dr. Villafuerte concluded that Plaintiff sustained significant injuries to his left shoulder and left ribcage as a result of the August 29, 2018 accident and noted that although the trauma to the left shoulder and left ribcage can heal by scar tissue formation, this tissue is less elastic and less functional, which results in a permanent reduction of motion. Dr. Villafuerte's notes include his advisement on multiple occasions that Plaintiff refrain from strenuous activity, but that Plaintiff reported that he must continue to work out of necessity. However, Dr. Villafuerte's notes also indicate that Plaintiff was cleared for "light duty" and "part time work" "out of necessity" by the orthopedist.

Dr. Rose treated Plaintiff throughout 2019, 2020, and 2021. At Plaintiff's initial visit with Dr. Rose, on September 17, 2018, Dr. Rose discussed surgery noting "patient failed conservative treatment thus far and MRI reveals partial rotator cuff tear" (NYSCEF DOC NO 28). Plaintiff underwent the following operative procedure on April 4, 2019, performed by Dr. Rose: arthroscopy of the left shoulder, labral debridement, rotator cuff debridement, synovectomy, and subacromial decompression. On Plaintiff's final visit with Dr. Rose, which took place on October 5, 2021, the range of motion of his left shoulder was limited with approximately 150 degrees of forward flexion (normal 180 degrees); abduction to 130 degrees (normal 180 degrees); internal

rotation to 75 degrees (normal 90 degrees); and external rotation to 50 degrees (normal 75 degrees). According to Dr. Rose’s reported notes, Plaintiff was cautioned on multiple occasions against any forceful extending and bending of the joint to avoid further injury, including “overhead lifting, pushing, and pulling.” Dr. Rose concluded that Plaintiff sustained a “partially permanent disability” as a result of the August 29, 2018 accident and that Plaintiff will have difficulty with any type of physical or sedentary activity due to the nature of his injuries.

By relating Plaintiff’s injuries to the accident and noting Plaintiff’s inability to perform customary daily activities for the three years following the subject accident, Plaintiff’s treating medical doctors raised triable issues of fact (*Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]; *Perl v Meher*, 18 NY3d 208 [2011]; *Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendant’s motion for summary judgment is DENIED; and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

11/16/2022  
DATE

  
JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	